No. 10886

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FEDERAL FARM MORTGAGE CORPORATION,
a corporation, APPELLANT,

vs.

HENRY ANDREW PAULSEN, APPELLEE.

APPELLANT'S REPLY BRIEF

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I

APPELLEE DID NOT FILE A CROSS APPEAL FROM THE DISTRICT JUDGE'S DECISION ON THE SECOND QUESTION PRESENTED TO HIM. THEREFORE, THE ISSUE THERE INVOLVED IS NOT BEFORE THIS COURT.

As stated in appellant's original brief, two questions were certified by the Conciliation Commissioner-Referee to the District Judge, who held that the first question should be answered in the affirmative and the second question in the negative. Appellant appealed from that portion of the decision of the District Judge which pertained solely to the first question. Appellee did not file a cross-appeal from the District Judge's decision on the second question.

In appellee's brief he makes no serious attempt to controvert appellant's contention as to the legal issue involved in the first question, and, in fact, supports the statement made

in his attorney's letter dated April 19, 1943, addressed to The Federal Land Bank of Berkeley, where it was said:

> "I am inclined to agree with you that your bank is technically within the law and that since Mr. Paulsen did not actually pay into court the appraised value within three years, he has no technical right to make this payment now; . . ." (TR. 31-1)

Appellee's additional facts, listed on pages 1 to 6 of his brief, as well as his argument, are devoted almost exclusively to the second question and the contention that there are equitable principles in favor of the appellee which should make the correspondence which passed between the appellee's attorneys and The Federal Land Bank of Berkeley pertinent to the issue, and, in fact, controlling. The second question certified to the District Judge was:

> "2. Whether, under the circumstances in this case as set forth by the correspondence attached to the bankrupt's petition for reappraisal, the appellant is estopped to deny that the bankrupt is entitled to a reappraisal of said property."

The District Judge answered this in the negative. Since no appeal was taken therefrom by the bankrupt, it is submitted that the question is not before this Court. However, so that appellant's views will be available in case this Court should consider that the question is before it, appellant submits this reply brief.

II

THERE IS ABSOLUTELY NO BASIS FOR APPELLEE'S ATTEMPT TO PLACE UPON APPELLANT THE BLAME FOR HIS FAILURE TO COMPLY WITH THE ORDERLY PROCEDURE OF SECTION 75(S)(3).

As a major premise, it is necessary to have in mind the fact that the three-year stay expired not later than March 25, 1943. Appellee makes much of the fact that under date

of March 24, 1943, a letter was written by his attorneys to The Federal Land Bank of Berkeley. (TR. 28, 29) The first letter written by the Bank to appellee's attorneys was dated April 2, 1943. (TR. 30) There had been no previous discussion or correspondence on the subject by or between the appellee and appellant. It is therefore evident that The Federal Land Bank of Berkeley could not possibly have said anything to the bankrupt or his attorneys during the three year stay, that would have in any way whatsoever influenced them regarding a compliance with the statute, which provides that "At the end of three years, or prior thereto, the debtor may pay into court the amount of the appraisal . . ."

The additional "facts" set forth in appellee's brief (pages 1-6) show that he bases his contention on wholly immaterial and irrelevant matters. We shall answer them seriatim.

His "fact" number 1 (page 1) is that appellant was the only creditor objecting to appellee's compromise offer. This is not material, nor, if it were, would it be unusual, since appellant was the only creditor having a lien on appellee's farm.

His "fact" number 2 (pages 1 and 2) is that he paid the rental which the statute required him to pay, and thereby acted in good faith. If he had not paid the rental, the three-year stay could have been shortened. His compliance with the law does not entitle him to any unusual favors which are not given him by the statute.

His "fact" number 3 (page 3) is that appellant did not ask for a reappraisal during the three years, and, apparently, that this lured appellee into failing to comply with the statute. The cause and effect, as conceived by appellee, are entirely without relativity or logic. The statement that on March 24, 1943, appellee "informed appellant that he had refinanced himself and could pay the entire balance due into court" is very misleading, as will readily be seen upon reading the letter of March 24, 1943. (TR. 28, 29) After stating

appellee's financial condition, the letter ended with: "I have in mind an extension of time with light payments." This is the direct converse of an offer or intention to make payment during the three-year period, or at the end thereof. Furthermore, in his letter of April 5, 1943, (TR. 31-b) it was made very clear that he never *intended* to pay the appraised value into court. His attorney said:

> "Mr. Paulsen advises me that he is ready to pay into court the *balance due on the appraised value of the property* after deduction of principal payments made by him *by way of rental.*"*

The courts have held that rental may not be credited on the appraised or reappraised value when a bankrupt attempts to redeem under the provisions of Section 75 (s) (3). *Wilson* v. *Dewey,* 133 F.(2d) 962; *Farmers Bank of Lohman* v. *Thompson,* 139 F. (2d) 408; *In re Schmidt,* 54 Fed. Supp. 262.

His "fact" number 4 (page 3) also contains misleading statements. It is said that "prior to replying to this letter, the appellant filed its petition of March 29, 1943." It is true that the petition was so dated, but it was verified on March 31, 1943, (TR. 24) and, although the date it was filed with the Conciliation Commissioner does not appear in the Transcript of Record, it was not received by or filed with the Conciliation Commissioner until on or after April 6, 1943.

His statement in his "fact" number 4-1, 2 (pages 3 and 4) also shows that his intention, even after the three years had expired, was to pay the original appraised value, *less the rental paid by him.* There is no showing whatsoever that he ever had or has had the ability to pay the original appraised value in full, *and he never offered to do so.*

In his "fact" number 4-3 (page 4) he says that throughout the three years appellant would have refused to accept

*Emphasis added to all quotations.

"such payment . . . thus showing to the appellee that the making of said payment would be merely an idle gesture." The letter from M. G. Hoffmann (TR. 31-e) referred to by appellee as showing him that the making of the payment would have been an idle gesture, was dated April 9, 1943, fifteen days *after* the time for making the payment into court had expired. Furthermore, it was not stated in said letter that appellant "would have refused to accept such payment." What was said, after explaining the reasons, was that "should the debtor have complied with the . . . Act, we would have requested a reappraisal." (TR. 31-f) This was appellant's statutory right and is no basis for appellee's statement that appellant was "apparently hoping to gain by the enhancement of value to the property resulting from appellee's desperate efforts to save his home." The original appraisal was $3,000.00, and on March 29, 1943, the indebtedness under appellant's deed of trust was $7,801.79. (TR. 21) Appellant had loaned appellee $5,500.00 on September 3, 1935. Appellee was adjudicated bankrupt on May 1, 1939. In view of the trend toward higher values between these periods there was little reason for appellant to believe that property upon which it had loaned $5,500.00 was actually worth but $3,000.00 less than four years later, even without taking into consideration the "enhancement of value." Appellee valued the property at $10,000.00 in his schedules. (TR. 8)

His "fact" number 4-4 (page 4) refers to a letter dated April 13, 1943, (TR. 31-i) in which it was stated by appellee's attorneys that appellee's wife had an inheritance which might be used to *compromise* the indebtedness due appellant rather than sacrifice their pigs. This letter was written very soon after appellee's other letters, wherein it was stated that "he could by selling all of his livestock and liquidating his assets" pay the amount necessary to be paid through the bankruptcy court. It seems quite probable that the inheritance was available when the previous letters were written,

and that the plea about not selling the pigs because of "war conditions" was more for effect than it was for cause.

His "facts" number 4-5, 7 (page 5) in which he again stresses the "war effort" and the desire (after the three years had expired) to procure appellant's consent to a reappraisal so he could "save his ranch and pigs" also fails to ring true. With the poor showing appellee had made during approximately eight years since he had procured the loan from appellant, it could easily be assumed that, if some other farmer acquired the property, there would be a more substantial boost to the "war effort" than if appellee continued to operate the farm.

His "fact" number 4-6, 7 (page 5) is another attempt to show that the equities, if not the law, are on his side simply because he allegedly acted in good faith and worked on his farm during the three-year stay, and, because appellant "acted solely with the view of obtaining possession of the ranch." Apparently he feels that appellant should be estopped from insisting on its legal rights, because it did not ask for a reappraisal. It hardly seems that he is entitled to the special considerations which he apparently thinks he should have because he worked on the farm during the three-year stay period. It has always been assumed that in enacting Section 75 Congress contemplated that a farmer-debtor would work hard and do everything possible in a last final effort to save his farm by complying with the statutory procedure *within the three-year stay period.*

There are no equities in favor of appellee. Even if there were, the courts have held that equitable principles may not be substituted for the "orderly procedure" prescribed by the statute. In *Borchard* v. *California Bank,* 107 F.(2) 96, (310 U. S. 311, 60 S.Ct. 957), this Court early in the judicial history of the present Frazier-Lemke Act held, in effect, that where a bankrupt had procured the same benefits under an

agreement with his creditors as he would have been able to procure by an order under Section 75 (s) (2), he should not be entitled to an additional three-year stay merely because the statutory procedure had not been followed to the letter. The Supreme Court of the United States disagreed and held that the orderly procedure of the statute must be followed. Since said decision it has been necessary for their own protection for creditors to insist that the "orderly procedure" be followed, and not to permit—even though they might be inclined to do so—and deviation from the law. Accordingly, appellant was in no position to consent to a "compromise" in lieu of payment of the appraised value into court, nor to a reappraisal after the expiration of the three-year stay.

His "fact" number 4-8 (page 6) states that appellee has been, since March 24, 1943, ready, able and willing to "pay the *balance* due, etc." This is further proof of the fact that under no circumstances would he have paid into court more than the difference between the appraised or reappraised value and the rental he had paid during the three-year stay.

Appellee's Argument is almost entirely a repetition of the arguments contained in his additional "facts." He repeats that the facts show that appellee notified appellant "prior to the expiration of the period that he was refinanced." He also repeats his reference to the "balance due" on the original appraisal. (page 11) His "prior" notice was his letter of March 24, 1943, written in Reno, Nevada, the day before the three-year stay expired, and mailed to appellant in Berkeley, California. The letter clearly was not a tender, but was a request for an extension of time. (TR. 28, 29) Payment into court is a statutory requirement. The letter shows unequivocally that upon its receipt there was nothing appellant could have done, before the end of the three years, that could have helped appellee pay the appraised value into court, as required by the statute. Section 75 (s) (3) does not provide

for a compromise of composition with creditors, but provides for a *redemption* through the bankruptcy court. We have no less an authority than the Supreme Court of the Uniter States that the first proviso of Section 75 (s) (3) constitutes a redemption statute. The word "redeem" was first applied to the effect of paying the appraised or reappraised value into court in *Wright* v. *Union Central Life Insurance Company,* 311 U. S. 273, 61 S. Ct. 196, 85 L. ed. 184.

In his brief appellee says:

> "In the present case the appellee is only asking that he be given an opportunity to redeem his property at the original appraised value, or at a reappraised value or at a value fixed by the Court before the Court orders a public sale." (page 12)

This is conceded. However, he had this opportunity for the full three-year period which Congress provided. Now he is "only asking" this Court to grant him a right that Congress did not see fit to grant any debtor.

III

APPELLEE'S ATTEMPT TO DISTINGUISH THE MILLER CASE WILL NOT BEAR CLOSE SCRUTINY

Appellee seeks to distinguish the instant case from *In re Miller,* 48 Fed. Supp. 13. The question in the Miller case was exactly the same as the first question in the instant case; that is, whether a bankrupt under Section 75 (s) has the legal right to have his property reappraised after the expiration of the three-year period where he failed to pay the appraised value into court, or even to attempt to do so, during the three-year period, and the creditor had therefore taken steps toward having a trustee appointed and the estate liquidated.

The distinction, according to appellee, is that in the Miller case the bankrupt was unable to refinance himself during

the three-year stay. On the other hand, appellee claims that in the instant case "the bankrupt notified the appellant prior to the expiration of the period that he was refinanced." This is a tenuous distinction which will not bear close examination. There certainly could be no better evidence of the fact that a bankrupt "is unable to refinance himself within three years" than the fact that he *did not* do so. Since Congress provided for the appointment of a trustee and liquidation of the estate where a bankrupt *does not refinance himself within the three years,* this Court, in order to hold with the bankrupt would have to "rewrite" the fore part of Sec. 75 (s) (3).

IV

APPELLEE HAS CONFUSED THE PROCEDURES UNDER THE FIRST AND UNDER THE SECOND PROVISO OF SECTION 75(S)(3)

Appellee contends that the "three-year moratorium is not a redemption statute." In support of this contention appellee refers to the ninety-day redemption period provided for in Section 75 (s) (3) where the property is sold at public auction under the provisions of the *second* proviso of Section 75 (s) (3). Appellee has confused the two procedures. In the instant case the provisions of the *first* proviso and not the *second* proviso are involved. If appellant prevails the property will be sold either by the bankruptcy trustee or under appellant's deed of trust, and appellee will have an opportunity to bid. Furthermore, as appellee was advised in appellant's letter of April 17, 1943, (TR. 31-i to 31-l) if appellant acquires title it will establish a sales price based upon the market value of the property, and the bankrupt will have an equal opportunity to buy the property at such sales price for cash. *Except for appellee's apparent belief that upon a reappraisal the value of the property will be established at less than its market value,* it is difficult to see why the procedure suggested by appellant in said letter of April 17, 1943, would

not have been preferable to appellee. By the time the property would have been offered for sale, the little pigs would no doubt have matured, and it would not have been necessary for appellee either to sacrifice the little pigs or to use his wife's inheritance. He would still have been entitled to his discharge in bankruptcy.

CONCLUSIONS

Appellant can not see that appellee has submitted any authority, or any pertinent argument, against the legal principle set forth in appellant's Statement of Points on Appeal. (TR. 47) It is respectfully submitted that the second question certified to the District Judge is not before this Court, or, if it is, that it must again be answered in the negative, as it was answered by the District Judge.

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